DATO' SERI ANWAR IBRAHIM v. KHAIRY JAMALUDDIN

HIGH COURT MALAYA, KUALA LUMPUR
AZIZUL AZMI ADNAN J
[CIVIL SUIT NO: S-23-44-2008]
3 OCTOBER 2017

TORT: *Defamation – Slander – Words uttered during speech – Plain and ordinary meaning of words – Whether slanderous of complainant – Whether words complained of bore lesser meaning – Whether defences of justification, partial justification, fair comment, qualified privilege and estoppel available to maker of statement*

CIVIL PROCEDURE: *Res judicata – Principles – Applicability – Tort action – Allegation of slander – Whether estoppel per rem judicatum applies in respect of different parties to action – Whether there were circumstances that res judicata should apply to prevent claimant/complainant from pursuing action against maker of statement – Evidence Act 1950, s. 43*

The plaintiff commenced the present action against the defendant, the deputy leader of UMNO Youth, following the words uttered by the latter in a speech delivered during his political campaign which were allegedly slanderous of the former. In his speech, the defendant likened the merging and separating of the opposition parties to 'kahwin muta'ah' and 'maksiat' and delivered the punchline 'Anwar main dua-dua ikut belakang'. The speech received media coverage and a video of it was uploaded online. In resisting the plaintiff's action, the defendant (i) contended that the words complained of bore a lesser meaning, which was that the plaintiff was in the habit of playing out his political allies; and (ii) pleaded the defences of justification, partial justification, fair comment and qualified privilege. The defendant also raised estoppel in his defence. According to the defendant, the plaintiff had sued Tun Dr Mahathir Mohamed on two previous occasions for having called the plaintiff a homosexual. In both cases, the plaintiff's actions were struck out because the court were of the view that prior criminal proceedings established the defences of justification and qualified privilege. The defendant thus argued that the plaintiff was barred from maintaining and prosecuting this current action due to the operation of the doctrine of binding precedent and *res judicata*.

Held (awarding plaintiff global sum of RM150,000 in damages):

(1) The words uttered by the defendant were defamatory of the plaintiff, based on the plain and ordinary meaning of those words, as understood by the ordinary and reasonable member of the public. The speech employed figurative humour to deliver the message that the alliance between the opposition parties was simply a marriage of expedience. The references in the speech to 'maksiat' and 'kahwin muta'ah'

introduced a sexual connotation, which culminated in the punchline, 'Anwar main dua-dua ikut belakang'. The allusion of these final words were clear; they suggested that the plaintiff engaged in homosexual activities. In the Malaysian culture and society, there is considerable stigma attached to homosexuality, and to attach such a label to another person tend to expose that person to hatred, ridicule and contempt in the mind of the reasonable person. That the words had exposed the plaintiff to ridicule and contempt was borne out by the boisterous reaction of the audience to the words uttered by the defendant. The lesser meaning contended by the defendant was not a relevant consideration if the import of the words bore a different primary meaning that formed the subject of the plaintiff's complaint. (paras 7, 10, 12, 13 & 19)

(2) In order to establish justification, counsel for the defendant sought, at trial, to introduce findings of fact in criminal proceedings that had been earlier instituted against the plaintiff. None of the exceptions in s. 43 of the Evidence Act 1950 ('the Act') applied in the present instance, the existence of the prior judgments was not a fact in issue, and accordingly the judgments in those other proceedings were inadmissible by virtue of s. 43 of the Act. There had been no change in the facts or circumstances of the case that would justify revisiting this ruling. In any event, it was not open for the court to revisit this ruling. The court was also bound by the principle of *stare decisis* and the decision of the Court of Appeal in *Datuk S Nallakaruppan v. Datuk Seri Anwar bin Ibrahim*, which remained the authority on the scope of s. 43. (paras 25 & 26)

(3) The particulars upon which the defendant sought to rely on for the defence of fair comment were the same particulars which were ruled to be inadmissible under s. 43 of the Act. The defendant sought to argue that the analysis would be different in the case of fair comment. However, this was not supported by the plain words of the statute. (paras 37 & 38)

(4) In circumstances where there exists a reciprocal duty and interest between the publisher of a defamatory statement and the recipient of such statement, the court would uphold a defence of privilege in the publication of the statement. However, this privilege would be defeated if the publication was motivated by malice. The defendant failed to prove that there existed a reciprocal duty and interest between him and the audience for him to have uttered what essentially amounted to a personal attack against the character of the plaintiff. The manner in which the words were uttered were without any genuine desire to apprise the general public of the suitability of the plaintiff to helm the Government. Rather, the prurient remark was made to invoke a response from the gathered crowd. (paras 39, 40 & 45)

(5) Estoppel *per rem judicatum* would, in the ordinary course, apply only in respect of the same parties to an action. In the present case, there were no circumstances to hold that *res judicata* should apply to prevent the plaintiff from pursuing his action against the defendant by reason only of the fact that the plaintiff had pursued a similar action against Tun Dr Mahathir. Furthermore, the scope and application of s. 43 of the Act were not argued before the courts in the prior cases involving Tun Dr Mahathir. Therefore, their decisions could not be used as authority for the scope and application of s. 43 of the Act. (para 49)

(6) The plaintiff was awarded the global sum of RM150,000 in damages, having taken into account (i) the nature of the allegation; (ii) the breadth of publication; (iii) the reputation of the plaintiff; and (iv) the effect of the publication and the contention of malice. (para 52)

Case(s) referred to:

Adam v. Ward [1917] AC 309 ***(refd)***
Chin Choon v. Chua Jui Meng [2005] 2 CLJ 569 CA ***(refd)***
Chok Foo Choo v. The China Press Bhd [1999] 1 CLJ 461 CA ***(refd)***
Datuk S Nallakaruppan & Ors v. Datuk Seri Anwar Ibrahim & Other Appeals [2015] 6 CLJ 425 CA ***(foll)***
Dr Aishah Tul Radziah L Hussin v. Dr Suresh Kumarasamy & Ors [2015] 10 CLJ 222 HC ***(refd)***
Goody v. Odhams Press Ltd [1966] 3 All ER 369 ***(refd)***
Hartecon JV Sdn Bhd v. Hartela Contractors Ltd [1997] 2 CLJ 104 CA ***(refd)***
Hollington v. F Hewthorn & Company Limited [1943] 1 All ER 35 ***(refd)***
Hong Leong Finance Bhd v. Low Thiam Hoe & Another Appeal [2015] 8 CLJ 1 FC ***(refd)***
Jeyaratnam Joshua Benjamin v. Lee Kuan Yew [1992] 2 SLR 310 ***(refd)***
Jones v. Skelton [1963] 3 All ER 952 ***(refd)***
Reynolds v. Time Newspapers Ltd [2001] 2 AC 127 ***(refd)***
Tun Datuk Patinggi Haji Abdul-Rahman Ya'kub v. BRE Sdn Bhd & Ors [1995] 1 LNS 304 HC ***(refd)***
Warren v. The Random House Group Ltd [2008] EWCA Civ 834 ***(refd)***

Legislation referred to:

Defamation Act 1957, s. 8
Evidence Act 1950, s. 43

For the plaintiff - R Sivasara, J Leela & Latheefa Koya; M/s Chambers of Leela J
For the defendant - Shafee Abdullah & Sarah Abishegam; M/s Shafee & Co

Reported by Najib Tamby

A

JUDGMENT

Azizul Azmi Adnan J:

Introduction

[1] It was 19 February 2008. Parliament had been dissolved six days earlier. Nomination of candidates for Malaysia's 12th general election was to occur on 24 February. The political campaigning would shortly go into full swing.

[2] The defendant, En Khairy Jamaluddin, was at that time the deputy leader of UMNO Youth. Part of his responsibility included launching the campaign machinery for the various youth divisions in UMNO.

[3] It was at one of these launches that he uttered words that the plaintiff, Dato' Seri Anwar Ibrahim, contended were slanderous of the plaintiff. This was what was said:

> Saya rasa meluat bila saya tengok tiap-tiap kali sebelum pilihan raya, parti pembangkang bergabung. Sebelum tahun '99 pilihan raya bergabung, Barisan Alternatif, lepas tu cerai. Tahun 2004 sebelum pilihan raya bergabung, selepas itu cerai. Tahun 2008 saya dengar nak bergabung sekali lagi, confirm lepas ini akan cerai. Dalam Barisan Nasional, UMNO, MCA, MIC, Gerakan, PPP, kita kahwin selama-lamanya. Kita tidak pernah cerai. Kita kahwin pada tahun 1955 dengan MCA dengan MIC, sampai hari ini kita tak cerai. Tapi pembangkang ini saudara-saudara, mungkin Dato' Norza tahu istilah ini, pembangkang ini dia kahwin muta'ah. Kahwin muta'ah ini saudara-saudara, mazhab Shi'ah, dia mengamalkan kahwin muta'ah. Dia kahwin satu malam, dia main malam tu, esok hari dia cerai, untuk menghalalkan maksiat. Parti pembangkang ini dia kahwin muta'ah. Dia kahwin, PAS main DAP ikut kiri, DAP main PAS ikut kanan, Anwar main dua-dua ikut belakang, lepas tu, bila kalah, dia cerai. Ini bukan untuk masa depan kita saudara-saudara.

[4] His speech was recorded by members of the media who were in attendance and was subsequently reported by the news portal Malaysiakini. A video clip of the speech was also subsequently uploaded onto its online news channel known as KiniTV.

Analysis

[5] It was not in dispute that there had been publication of the statement complained of, and that the statement referred to the plaintiff.

[6] The key issues were therefore whether the words were defamatory of the plaintiff, and if so, whether the defendant is able to avail himself of the pleaded defences.

Whether The Statements Were Defamatory

Aspersions Of Homosexuality

[7] I am of the view that the words uttered by the defendant were defamatory of the plaintiff, based on the plain and ordinary meaning of those words, as understood by the ordinary and reasonable member of the public. These words suggested that the plaintiff was a homosexual.

[8] The Court of Appeal in the case *Chok Foo Choo v. The China Press Bhd*[1] described the two steps that are to be undertaken in order to ascertain whether or not the words are defamatory of the plaintiff. The first step is to ascertain whether the words are capable of bearing a defamatory meaning. The second step is to ascertain whether the words complained of are in fact defamatory.

[9] I am of the view that the questions in both steps are answered in the affirmative.

[10] Taken literally, the words "Anwar main dua-dua ikut belakang" may not support the contention that the defendant had defamed the plaintiff, because – as rightly pointed out by counsel for En Khairy – political parties cannot be sodomised. However, the words must be understood from the context of the speech as a whole. The speech is an artful one, delivered with fluency and an impeccable sense of timing. The defendant, like the plaintiff, is a skilled orator. The speech employs figurative humour to deliver the message that the alliance between the opposition parties is simply a marriage of expedience. The references in the speech to maksiat and kahwin muta'ah introduced a sexual connotation, which culminated in the punchline, "Anwar main dua-dua ikut belakang". The allusion of these final words are clear. They suggest that the plaintiff engaged in homosexual activities. For this reason, I am of the view that the words are capable of bearing a defamatory meaning.

[11] In determining the question at the second step of the process, one of the tests to be applied is whether the words complained of would expose the plaintiff to hatred, ridicule or contempt in the mind of a reasonable man or would tend to lower the plaintiff in the estimation of right-thinking members of the public generally (See *Tun Datuk Patinggi Haji Abdul-Rahman Ya'kub v. BRE Sdn Bhd & Ors*[2]).

[12] In the Malaysian culture and society, there is considerable stigma attached to homosexuality, and therefore to attach such a label to another person would, in my considered judgment, tend to expose that person to hatred, ridicule and contempt in the mind of the reasonable person. The reasonable person in this context must be imbued with the values and beliefs prevalent and subsisting in our society at this present time. It may well be that in other cultures and in other times, homosexuality would be acceptable by society generally, but that is not the case in our society today.

[13] That the words had exposed the plaintiff to ridicule and contempt is borne out by the boisterous reaction of the audience to the words uttered by the defendant.

Whether Innuendo And Whether Particulars Of Extrinsic Facts Needs To Be Pleaded

[14] The words were not in my view in the nature of an innuendo. The words may have an indirect meaning, in that the words could be said to be a euphemism for the act of sodomy, but that does not take the words outside their ordinary and natural meaning. In *Jones v. Skelton*[3], Lord Morris stated as follows:

> The ordinary and natural meaning of words may be either the literal meaning or it may be an implied or inferred or an indirect meaning: any meaning that does not require the support of extrinsic facts passing beyond general knowledge but is a meaning which is capable of being detected in the language used can be a part of the ordinary and natural meaning of words (see *Lewis v Daily Telegraph Ltd*). The ordinary and natural meaning may therefore include any implication or inference which a reasonable reader, guided not by any special but only by general knowledge and not fettered by any strict legal rules of construction, would draw from the words.

[15] The fact that the words drew a reaction from the crowd support the position that no knowledge of specific extrinsic facts were necessary for the sting of the words to be understood. For this reason, I am of the view that it was not necessary for the plaintiff to have pleaded further particulars.

[16] The defendant testified that the meaning attributed to the words by the plaintiff was not the meaning he had intended. His intended meaning is however irrelevant. What is pertinent was the natural and ordinary meaning of the words as understood by reasonable members of the audience using their general knowledge and common sense. In *Jeyaratnam Joshua Benjamin v. Lee Kuan Yew*[4], the Singapore Court of Appeal held as follows:

> In determining the natural and ordinary meaning of the words complained of, the sense or meaning intended by the appellant is irrelevant. Nor for such purpose is the sense or meaning in which the words were understood by the respondent relevant. Nor is extrinsic evidence admissible in construing the words. The meaning must be gathered from the words themselves and in the context of the entire speech made by the appellant on that occasion. It is the natural and ordinary meaning as understood by reasonable members of the audience at the Bedok car park that evening using their general knowledge and common sense. Such meaning is not confirmed to a literal or strict meaning of the words, but includes any inferences or implications which could reasonably be drawn by such persons.

The Lesser Meaning: In The Habit Of Playing Out His Political Allies

[17] The defendant contends that the words complained of bear a lesser meaning, which is that the plaintiff is in the habit of playing out his political allies. In my judgment, this does not answer the main charge of the plaintiff. Even if the words uttered were capable of bearing a meaning that the plaintiff is inclined to out-manoeuvre his allies, that does not address the plaintiff's complaint about the words uttered, which I have determined asserted that the plaintiff is homosexual or engaged in homosexual activities.

[18] In *Warren v. The Random House Group Ltd*[5], the English Court of Appeal stated as follows:

> The principle on which the judge struck out the *Lucas-Box* meaning and the particulars is that a claimant is entitled to confine his complaint to a published defamatory meaning, and that a defendant is not then entitled to enlarge the ambit of the contest by asserting and seeking to justify a separate and distinct meaning, in the sense that the defamatory imputation is different, of which the claimant does not complain and which is not embraced within a common sting of the publication complained of. An example of this would be if a publication asserts that the claimant is a thief, and the defendant seeks to assert and justify a quite separate meaning to the effect that the claimant is an adulterer. By contrast, provided it is not oppressive to do so, a defendant is entitled to justify a common sting derived from parts of a publication, taken as a whole, of which the claimant does not complain, in so far as they are relevant to the meaning of the words complained of and to the sting of the alleged libel. The claimant is not entitled to use a blue pencil on the words published of him so as to change their meaning and then prevent the defendant from justifying the words in their unexpurgated form. Whether a defamatory statement is separate and distinct is a question of fact and degree in each case. The action should concern itself with the essential issues necessary for a fair determination of the dispute between the parties. The classic exposition of these principles is in the judgment of O'Connor LJ in *Polly Peck (Holdings) plc v. Trelford* [1986] QB 1000

[19] Thus the lesser meaning contended by the defendant is not a relevant consideration if the import of the words bear a different primary meaning that forms the subject of the plaintiff's complaint. In any event, I am also of the view that the lesser meaning is not defamatory of the plaintiff, and hence it would not be necessary to consider the circumstances that the defendant claimed gave rise to justification for this lesser meaning.

[20] A statement to the effect that the plaintiff is in the habit of playing out his political allies would not be considered by the reasonable person – the hypothetical man on the Cheras MRT – to be defamatory of the plaintiff. The complained of words must be considered in the light of the fact that the words had been uttered by a politician of a rival politician. Two factors come into play in this regard.

[21] The first is that, given the circumstances under which the statement was made (which was that it was a speech by a politician at a political rally in the run-up to general elections) the ordinary reasonable man would have regarded the statement not just as part of the bluster of the occasion but also with a healthy dose of scepticism. In other words, the identity of the speaker and the circumstances of the speech would have caused a reasonable person to have discounted to some extent the veracity of the assertion.

[22] The second is that the plaintiff is also a politician, and a seasoned one at that. He would have, in the course of his political career, been exposed to the intrigue, manoeuvrings, subterfuge, plot and sub-plot that is part and parcel of a life in politics. To the reasonable observer, a statement that the plaintiff is inclined to play out his allies would not in any appreciable way lower the estimation of the plaintiff in the eyes of the observer. A career politician as seasoned as the plaintiff would have had a lifetime to cultivate a skin impervious to all but the most wounding of insults. For a politician to be called someone who plays out his allies is in my view a very mild statement in the circumstances, certainly not one that forms the basis for actionable defamation. For these reasons, the lesser meaning attributed to the words by the defendant are not defamatory of the plaintiff.

[23] In coming to this decision, I have considered the views of my brother judge S Nantha Balan JC (as His Lordship then was) in an earlier reported decision in this case[6], where it was held that the proposed lesser meaning was itself inherently harmful to the reputation of a politician and were therefore themselves defamatory of the plaintiff. I respectfully depart from his views, for the reasons explained above.

The Defences

[24] Having established that the words complained of were defamatory of the plaintiff (based on the primary meaning of those words), and taking into account that it was not in dispute that the words had in fact been published and that they had referred to the plaintiff, I will now examine whether any of the pleaded defences have been made out. The burden of establishing the existence of these defences lay with the defendant.

Justification

[25] In order to establish justification, counsel for the defendant had sought at trial to introduce findings of fact in criminal proceedings that had been earlier instituted against the plaintiff. I ruled that none of the exceptions in s. 43 applied in the present instance, that the existence of the prior judgments is not a fact in issue, and that accordingly the judgments in those other proceedings were inadmissible by virtue of s. 43 of the Evidence Act 1950.

[26] Learned counsel for the defendant invited me to revisit this ruling. I am of the view that:

(a) there has been no change in the facts or circumstances of the case that would justify my revisiting this ruling;

(b) in any event, it is not open to me to revisit this ruling, based on the decision in *Hartecon JV Sdn Bhd & Anor v. Hartela Contractors Ltd*[7]. In this case, the Court of Appeal held that once a judge has made his ruling, whether such ruling was substantive or merely procedural, final or interlocutory, that ruling must be adhered to and may not be reopened except upon appeal; and

(c) this court is also bound by the principle of *stare decisis* and the decision of the Court of Appeal in *Datuk S Nallakaruppan & Ors v. Datuk Seri Anwar Ibrahim & Other Appeals*[8], which remains the authority on the scope of s. 43.

[27] Before me, counsel for the defendant raised an additional point, which he stated had not been raised before the Court of Appeal in *Datuk S Nallakruppan v. Datuk Seri Anwar Ibrahim*. Section 43 makes reference to "judgments, orders and decrees". Counsel sought to argue that, because of the principle that Parliament does not legislate in vain, we must attribute meaning to the phrase "judgments, orders and decrees" and not regard the words as mere tautology or surplusage. Therefore – argued counsel – the word "judgment" must be taken to mean something other than "order or decree", and ought to encompass opinions and findings of fact contained in the written grounds of a decision of a court. Accordingly, learned counsel argued that certain remarks made in the judgment of Abdul Hamid Mohamad FCJ in a criminal case where the plaintiff had been charged[9] ought to be admissible on the basis that these remarks constituted the opinion of the court (and is therefore a "judgment" within the meaning of s. 43), and that the existence of this opinion is a fact in issue in the present case before me.

[28] The answer to this is simply that the fact in issue in the present case is not whether such a judgment or opinion existed, but rather the truth or otherwise of the assertion contained in such judgment or opinion. The latter is in fact what learned counsel for the defendant sought to establish by the adduction of the evidence of the prior criminal proceedings, and this is prohibited by the clear terms of s. 43 of the Evidence Act 1950.

[29] I am not unsympathetic to the view that prior findings of a court of law ought to be admissible in (even if not binding upon) subsequent proceedings. To the lay observer it may appear incongruous and indeed inefficient for the courts to have to disregard the judgments and findings of other courts of the land, particularly when those findings have been made based on the higher criminal standard of proof. However, as has been stated time and again, the courts do not make laws. That is the prerogative of the Legislature. Both the litigants here are better placed than the courts to legislate reform to s. 43.

A **Partial Justification**

[30] The defendant sought to raise the defence of partial justification. In my judgment, this defence fails for the same reason explained above: the evidence upon which the defendant sought to rely for the defence of partial justification are the judgments in the criminal cases involving the plaintiff, which I have held to be inadmissible due to the application of s. 43 of the Evidence Act 1950.

[31] Section 8 of the Defamation Act 1957 provides as follows:

> 8. Justification
>
> In an action for libel or slander in respect of words containing two or more distinct charges against the plaintiff, a defence of justification shall not fail by reason only that the truth of every charge is not proved if the words not proved to be true do not materially injure the plaintiff's reputation having regard to the truth of the remaining charges.

[32] It was advanced for the defendant that there were several distinct meanings in the statement complained of. I understood learned counsel's argument to be along the following lines: the meanings attributable to the charges of homosexual conduct or activity could be justified by reason of the prior criminal proceedings, and hence the defence of justification should not fail simply because the other meanings – relating for example to the plaintiff's suitability for public office – do not materially injure the plaintiff's reputation.

[33] Counsel for the defendant submitted at length on the decision of *Goody v. Odhams Press Ltd*[10], and the criticism there of the earlier decision of *Hollington v. F Hewthorn & Company Limited*[11]. It will not be necessary for me to address these submissions specifically, for these are the same arguments raised by counsel for the defendant in *Datuk S Nallakruppan v. Datuk Seri Anwar bin Ibrahim*, and which have been addressed in that case by the judgment of Abdul Aziz Rahim JCA.

[34] Suffice to say that this court is bound by decision in that case, which precludes the admission into evidence of prior judgments of court, save in the limited circumstances where the statutory exceptions apply, or where the existence of the judgment itself is a fact in issue.

Fair Comment

[35] The defendant had made an application to amend his defence on 14 March 2017, which was after the trial had completed. From the bar, it was explained that the reason this was so was because of the decision of the court on 6 February 2017 ruling that the evidence of the judgments in the prior criminal proceedings were not admissible.

[36] I dismiss the application to amend for two reasons: A

(a) the reason provided by counsel was in my view not one that adequately justified the delay on the part of the defendant to make the amendment. In *Hong Leong Finance Bhd v. Low Thiam Hoe & Another Appeal*[12], Zulkelfli Ahmad Makinudin CJ (Malaya) (as His Lordship then was) speaking for the Federal Court summarised the applicable principles in the following oft-quoted passage: B

> [33] Having considered the facts and the circumstances of the present case, our views are as follows:
>
> (a) When dealing with an application to amend the pleadings, which introduce a new case in the claim or defence, on the eve of the trial, the principles in *Yamaha Motor* are not the sole considerations. C
>
> (b) The principles in *Yamaha Motor* applies to cases where the application to amend the pleadings is made at an early stage of the proceedings. D
>
> (c) That there has to be a cogent and reasonable explanation in the applicant's affidavit as to why the application was filed late.
>
> (d) That the application to amend the pleadings is not a tactical manoeuvre. E
>
> (e) That the proposed amendment must disclose full particulars for the court to ascertain if there is a real prospect of success in proving the same.
>
> (f) That lateness in the application to amend the pleadings cannot necessarily be compensated by payment of costs. F

In the present case, the amendment application has been made after trial had completed. Accordingly, this is not a case where the amendment has been made at an early stage in the proceedings. There will therefore need to be a cogent and reasonable explanation for the fact that the amendment application was made only in March 2017, bearing in mind G that the plaintiff had filed his writ in 2008, that the trial proper had commenced on 19 September 2016 and that the defendant had on two prior occasions applied to amend his defence.

In my respectful view, the fact that the court had made a ruling on admissibility of the prior judgments does not afford sufficient reason to H justify the application for amendment at such a late stage. Counsel conducting the case ought to have raised all and any applicable defences before the close of pleadings, based on the facts and circumstances of the case. Rulings on admissibility do not provide good grounds for a party to change its tack after its ship has sailed. I

A (b) in order to establish fair comment, the defendant must have had an honest belief that the statements were true, and because the amendment was made after trial had completed, the plaintiff has been denied the opportunity to cross-examine the defendant on his state of mind. In other words, the amendment, if allowed at this late stage, would be
B prejudicial to the plaintiff.

[37] In any event, the particulars upon which the defendant sought to rely on for the defence of fair comment are the same particulars that I have ruled to be inadmissible under s. 43 of the Evidence Act.

C **[38]** Learned counsel for the defendant sought to argue that the analysis would be different in the case of fair comment. However, I do not see that this is supported by the plain words of the statute.

Qualified Privilege

D **[39]** The defendant raised the defence of qualified privilege. In circumstances where there exists a reciprocal duty and interest between the publisher of a defamatory statement and the recipient of such statement, the court will uphold a defence of privilege in the publication of the statement. However, this privilege will be defeated if the publication was motivated by malice.

E **[40]** In my judgment, the defendant has failed to prove that there existed a reciprocal duty and interest between him and the audience for him to have uttered what essentially amounts to a personal attack against the character of the plaintiff.

F **[41]** In the case of *Adam v. Ward*[13], the House of Lords explained the relevance and significance of the occasion and circumstance of the publication:

> It was not disputed, in this case on either side, that a privileged occasion is, in reference to qualified privilege, an occasion where the person who
G makes a communication has an interest or duty, legal social or moral, to make it to the person to whom it is made, and the person to whom it is so made has a corresponding interest or duty to receive it. This reciprocity is essential.

[42] In this case, the defendant's speech was delivered at the launch of the
H election machinery of the Lembah Pantai UMNO Youth Division in the lead up to the 12th general elections. The defendant at the time was the deputy leader of UMNO Youth, and had been asked to deliver a speech at the launch. The attendees, by the defendant's own testimony, were members of UMNO Youth. The defendant further testified that the launch was "an
I opportunity for the Lembah Pantai party machinery to get an update on current political issues as well as explanation on various other issues from the UMNO Youth Leaders".

[43] It was advanced for the defendant that as deputy leader of UMNO Youth, he had a legal, moral and social duty to the public at large to publish matters concerning the public and the Malay community, and the public at large had a corresponding legitimate interest in receiving the information affecting their social, economic and political welfare. I have no doubt on the correctness of this proposition, but the scope of the reciprocal duty and interest has to be considered in the light of the words that had been uttered. Here, the words cast aspersions on the plaintiff's sexual inclinations. I do not see how the members of UMNO Youth that were present had a legitimate interest in knowing salacious details about the plaintiff's personal life. Nor would the public at large have any such legitimate interest.

[44] It was also advanced on behalf of the defendant that comments on "the conduct and suitability of office of those exercising the powers of Government are essential to the proper operation of a representative democracy". Here again I am in agreement with counsel for the defendant on the basic proposition that he advances. However, there are to my mind two flaws with learned counsel's arguments:

(a) the first is that the audience at the launch were members of UMNO Youth, who it may be safely said have already made up their minds on which party to support at the upcoming elections, and who were not looking to be persuaded. The defendant was, in other words, preaching to the choir. Accordingly, the element of legitimate interest cannot be said to arise; and

(b) secondly, even if the publication of the statement is taken in the context of its subsequent distribution through electronic media, as I have already stated at para. 43 above, the members of the general public cannot be said to have any legitimate interest in being told that the defendant engages in homosexual activities. In this regard, I am of the view that members of the public are to be taken as the reasonable and right-thinking members of the public.

[45] I come to this conclusion with particular regard to the manner in which the words were uttered. I am of the view that they were said without any genuine desire to apprise the general public of the suitability of the plaintiff to helm the Government. (It will be remembered that the plaintiff was not even a Member of Parliament at the material time.) Rather, the prurient remark was made to invoke a response from the gathered crowd.

[46] Although the intent of the maker of any statement is not a relevant consideration in determining whether such statement is defamatory[14], I am of the view that the intent of the speaker is nonetheless is relevant for the purposes of determining whether the defence of qualified privilege applies, in particular when ascertaining whether there exists a reciprocal duty and interest between the speaker and the audience.

[47] As I am of the view that the statement made by the defendant (insofar as such statement suggested that the plaintiff was a homosexual or engaged in homosexual activities) was not a matter in the public interest, it will not be necessary for me to consider the further question of whether the factors referred to in the House of Lords decision of *Reynolds v. Time Newspapers Ltd*[15] have been fulfilled in order to afford the defendant the defence of qualified privilege.

Estoppel

[48] The defendant raised estoppel in his defence. The plaintiff had sued Tun Dr Mahathir Mohamed on two previous occasions for having called the plaintiff a homosexual. In both these cases[16], the plaintiff's actions were struck out because the court were of the view that prior criminal proceedings established the defences of justification and qualified privilege. The defendant thus argued that the plaintiff was barred from maintaining and prosecuting this current action due to the operation of the doctrine of binding precedent and *res judicata.*

[49] I am of the view that the defendant's defence of estoppel fails for the following reasons:

(a) firstly, *estoppel per rem judicatum* would, in the ordinary course, apply only in respect of the same parties to an action. Exceptionally, cause of action estoppel may apply even where the parties differ, where for example the act complained of arose out of the same transaction and where the plaintiff had the opportunity to (but did not) join the defendant in the prior action (see *Dr Aishah Tul Radziah L Hussin v. Dr Suresh Kumarasamy & Ors*[17]). In the present case, there are no circumstances that would lead me to hold that *res judicata* should apply to prevent the plaintiff from pursuing his action against the defendant by reason only of the fact that the plaintiff had pursued a similar action against Tun Dr Mahathir; and

(b) secondly, the scope and application of s. 43 of the Evidence Act 1950 were not argued before the courts in the prior cases involving Tun Dr Mahathir. By contrast, the s. 43 was argued extensively before me, and the case of *Datuk S Nallakaruppan v. Datuk Seri Anwar Ibrahim*, which I consider to be binding precedent on this court in as far as the scope of s. 43 is concerned, was brought to my attention. I am bound to consider and to determine the issues that had been properly brought before this court, in accordance with the law.

It is often forgotten that courts can only decide based on the issues that have been raised and argued before them. If a point of fact is not made an issue between the parties, the law precludes the courts from taking cognisance of that fact in determining a case. There is of course more

leeway for the courts to take into account a point of law that had not been pleaded, but even here the courts will be guided, even if not constrained, by the manner in which the parties and counsel have framed the issues and argued their respective cases.

Thus it is not the case that I consider the cases involving Tun Dr Mahathir not to be binding authority on this court. They are indeed binding on me, to the extent that they are decisions of superior courts. Nonetheless, because the issue of s. 43 was not canvassed before Their Lordships on those previous occasions, their decisions cannot be used as authority for the scope and application of s. 43.

[50] As none of the pleaded defences has been made out, I found the defendant liable in defamation to the plaintiff. The next issue for consideration is the quantum of damages.

Quantum Of Damages

[51] The general principles applicable for the determination of the quantum of damages in defamation cases would include the gravity of the allegation, how broadly the statements had been circulated, the effect of the publication, the nature and extent of the plaintiff's reputation as well as the behaviour of the respective parties. See for example, the decision of the Court of Appeal in *Chin Choon v. Chua Jui Meng*[18], in which case courts were also encouraged to maintain the practice of making a global award in defamation cases without the need for separate awards for aggravated and/or exemplary damages.

[52] I award the global sum of RM150,000 in damages to the plaintiff, having taken into account the following factors:

(a) The nature of the allegation. The nature of the allegation against the plaintiff was serious, which if true may result in criminal liability both under the Penal Code and under the various State Enactments codifying the Shariah;

(b) The breadth of publication. The defamatory statement had been made at a public event which was reported by the media and was subsequently widely republished through electronic media;

(c) The reputation of the plaintiff. The plaintiff is a well-known public figure, who had held one of the highest public offices in the land.

It was advanced for the defendant that "the plaintiff's reputation in the Malaysian community was so tarnished and sullied before the publication of the impugned passages that no further reputational harm can take place against (him)". Learned counsel in fact raised this as a defence to the plaintiff's claim.

I am of the view that there is no defence of a libel proof plaintiff under Malaysian law. Indeed, counsel for the defendant did not advance any authority for his postulation. Accordingly, I have considered this "defence" only for the purposes of determining quantum.

Having considered the totality of the evidence before me, I am in favour accepting the position advanced on behalf of the plaintiff, for two reasons. The first is that, even though it may be seen that public opinion of him may be polarised, the objective facts regarding the stature of the plaintiff cannot be gainsaid. The plaintiff testified that he has held many positions in various reputable organisations and has received numerous awards up to the time of the publication of the words complained of. None of this evidence was seriously challenged by witnesses for the defendant.

Secondly, the evidence by which the defendant sought to establish the alleged poor reputation of the plaintiff is the same evidence that I have held to be inadmissible, as explained at para. 25 *et seq.*, *ante*. In the case of *Dato' Seri Anwar Ibrahim v. Datuk S Nallakaruppan*[19], at the High Court, the evidence of the prior criminal proceedings was held to be admissible for the purposes of determining the quantum of damages (but not for the purposes of establishing a defence of justification). This decision was however subsequently overturned by the Court of Appeal[20];

(d) The effect of the publication and the contention of malice. It was advanced that the plaintiff had provided unrebutted testimony that the allegations had caused tremendous hardship on him and his family. Even if this testimony was unrebutted, I am of the view that the correctness of his assertion must still be viewed and assessed in the context of the objective facts and surrounding circumstances. I am not satisfied in the present case that any hardship that the plaintiff has suffered had been caused in any material respect by the words uttered by the defendant.

Part of why this is so is that the words had been uttered at a partisan gathering of the party faithful. In my judgment, any reasonable member of the public viewing a recording of the speech in the context in which it was delivered would have considered it to be part of the polemics that is only to be expected in the run-up to a general election. Even though the statement is in *stricto sensu* defamatory of the plaintiff, nonetheless I am not satisfied that the effect of the statement made by the defendant had the far-reaching consequences suggested by the plaintiff.

The life of elected officials and those who are involved in politics will expose them to the thrust and parry of the political arena. More so when the public mood is stirred and brought to boil ahead of a general election. An occasional barb may land below the belt, and such barb

may well be defamatory, and I have held in this case. This reality is however par for the course for politicians, who as a consequence develop considerably thick skins to absorb and deflect criticisms.

It was advanced for the plaintiff that I ought to infer the existence of malice by reason of, among others, the defendant's gestures, facial expression and tone of voice, by the fact that he was not even a candidate for the Lembah Pantai constituency (where the speech was delivered), by the fact that the speech was made out of ill-will and with a dominant motive to smear the plaintiff, and by the defendant's subsequent conduct, including his statements in a reported interview where he purportedly expressed hatred for the plaintiff.

I have examined closely the video of the speech, and I do not detect evidence of malice in the gestures, facial expressions and tone of voice of the defendant. As for the other factors that purportedly establish malice, I am of the view that these are simply more examples of the ordinary vicissitudes of a life in politics, where invectives may be exchanged without (or with little) true personal enmity.

Accordingly, I am of the view that the contention of malice has not been made out and I dismiss the claims for aggravated and exemplary damages.

Orders

[53] For the reasons explained, there is judgment as follows:

(a) the defendant is to pay compensatory damages of RM150,000 to the plaintiff;

(b) the plaintiff's claims for aggravated and compensatory damages are dismissed;

(c) I decline to exercise my discretion to grant an injunction to the plaintiff, for the reason that the words complained of were uttered more than nine years ago, and much has changed since then such that the terms of the injunction may no longer be appropriate in the circumstances;

(d) the defendant is to further compensate the plaintiff for an amount determined at a rate of 4% per annum on the judgment sum from 19 February 2008 until 29 September 2017;

(e) the defendant will also be liable to the plaintiff for an amount determined at a rate of 5% per annum on the sum of the amounts referred to in sub-paras. (a) and (d) above remaining unpaid from 30 September 2017 until full satisfaction; and

(f) costs in the amount of RM60,000 for these proceedings, and a sum of RM5,000 for the prior proceedings before the Federal Court.

Endnotes:

1. [1999] 1 CLJ 461, [1999] 1 AMR 753, [1999] 1 MLJ 371, [1998] 2 MLRA 287.
2. [1995] 1 LNS 304, [1996] 1 MLJ 393, [1995] 4 MLRH 877.
3. [1963] 3 All ER 952.
4. [1992] 2 SLR 310.
5. [2008] EWCA Civ 834.
6. *Dato' Seri Anwar Ibrahim v. Khairy Jamaluddin* [2015] 7 CLJ 59, [2015] 5 AMR 37, [2016] 6 MLJ 226, [2015] 6 MLRH 586.
7. [1997] 2 CLJ 104, [1996] 2 AMR 1457, [1996] 2 MLJ 57, [1995] 2 MLRA 505.
8. [2015] 6 CLJ 425, [2015] 4 MLJ 34, [2015] 5 MLRA 471.
9. Reported at *Dato' Seri Anwar Ibrahim v. PP & Another Appeal* [2004] 3 CLJ 737, [2004] 5 AMR 265, [2004] 3 MLJ 405, [2004] 1 MLRA 634.
10. [1966] 3 All ER 369.
11. [1943] 2 All ER 35.
12. [2015] 8 CLJ 1; [2016] 1 MLJ 301; [2016] 3 MLRA 81.
13. [1917] AC 309.
14. See para. 16, *ante*.
15. [2001] 2 AC 127.
16. The first case is reported as *Dato' Seri Anwar Ibrahim v. Dato Seri Dr Mahathir Mohamad* [1999] 7 CLJ 32, [1999] 4 AMR 3926 (HC), affirmed in *Dato' Seri Anwar Ibrahim v. Dato' Seri Dr Mahathir Mohamad* [2001] 1 AMR 589, [2001] 1 CLJ 519, [2001] 1 MLJ 305 (CA). Leave was refused by the Federal Court in its decision reported at [2001] 2 AMR 1333, [2001] 1 CLJ 663, [2001] 2 MLJ 65. The second case is *Dato' Seri Anwar Ibrahim v. Tun Dr Mahathir Mohamad* [2007] 4 AMR 599, [2007] 5 CLJ 118, [2007] 5 MLJ 406.
17. [2015] 10 CLJ 222, [2014] 5 AMR 335, [2014] 11 MLJ 702.
18. [2005] 2 CLJ 569, [2005] 3 AMR 189, [2005] 3 MLJ 494, [2004] 2 MLRA 636.
19. [2014] 1 AMR 647, [2014] 1 MLRH 355.
20. See *Datuk S Nallakaruppan v. Dato' Seri Anwar Ibrahim* [2015] 4 MLJ 34 at para. 30.